Hooi Siew Yan & Anor v CHN Commodity Trade Centre Sdn Bhd (in liquidation) & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-1914–09 OF 2017
ABDUL RAHMAN SEBLI, MARY LIM AND YEW JEN KIE JJCA
3 APRIL 2019

Companies and Corporations — Liquidators — Removal of — Whether liquidator failed to recognise appellants as creditors — Whether liquidator failed to serve proper notice of meeting of contributories to appellants — Whether liquidator unlawfully rejected proof of debt filed by appellants — Whether liquidator sold subject property at undervalue — Whether liquidator unlawfully dealt with subject property which was charged to third party — Whether liquidator had not acted impartially — Whether liquidator ought to be removed — Companies Act 1965 s 232(1) — Companies (Winding-Up) Rules 1972 r 114

This was an appeal against the decision of the High Court judge who dismissed the appellants' application for the removal of the court appointed liquidator of the first respondent ('the liquidator'). The brief facts were that the directors of the first respondent requested a shareholder and director of the second appellant to invest and secure investors to fund the first respondent's acquisition of the subject property. The first respondent had entered into a sale and purchase agreement with various parties to purchase the subject property on 28 February 2014 and obtained a term loan from United Overseas Bank (M) Bhd ('UOB') to part finance the purchase of the subject property secured against a debenture over the subject property. However, the first respondent was compulsorily wound up on the petition of the second respondent for non-payment of the maintenance charges for the subject property and the liquidator was appointed by the first respondent. Further, due to the first respondent's default in repayment, UOB appointed two persons to be receivers and managers of the first respondent ('R&Ms'). The liquidator accepted an offer from Paradise Boulevard to acquire the subject property for RM54m and applied to court for directions for the sale of the subject property as UOB's consent was not obtained. On 19 June 2017, the appellants in their capacity as the majority contributories of the first respondent filed an application for the removal of the liquidator under s 232(1) of the Companies Act 1965. The present appeal revolved around the following issues: (a) rejection of the appellants as creditors and/or contributories of the first respondent; (b) failure of the liquidator to give notice to the appellants of the creditors' meeting; (c) failure to consider unlawful rejection of the proof of debt ('POD'); (d) unlawful sale of the subject property at an undervalue;

A (e) unlawful dealing with the subject property which was charged to UOB; and
(f) lack of impartiality in determining the first respondent's creditors.

Held, dismissing the appeal:

B (1) It was unfair for learned counsel to criticise the learned judge for not considering the issues on the liquidator's failure to investigate the affairs of the first respondent and the liquidator's rejection of the appellants as creditors and contributories of the first respondent for the reason that counsel for the appellant did not canvass these issues either in their C written or oral submissions. The appellants therefore could not be permitted to put these issues before the appeal court hoping for intervention. Any intervention would be tantamount to a breach of the rule of natural justice as the learned judge had not been given an opportunity to express her views on the matter (see paras 15–16).

D (2) The provision in r 114 of the Companies (Winding-Up) Rules 1972 was abundantly clear that only creditors of the company were entitled to be served with notice. Since the liquidator had not accepted the appellants as creditors of the first respondent, the issue of the liquidator failing to give proper notice to the appellants of meeting was a non-starter and E insufficient to constitute reasonable cause for removal (see paras 32–33).

(3) The learned judge did not give any view on the rejection of the POD because the appellants did not pursue this issue before the learned judge by reason that there was an appeal challenging the decision of the F liquidator in rejecting the POD which appeal was still pending. Further, vide a stay application, the parties agreed to stay the appeal application against the rejection of the POD pending the disposal of the present appeal. The appellants could not be allowed to raise this issue of rejection of POD which was the subject of another pending appeal (see G paras 38–40).

(4) The liquidator had given notice to the first and second appellants of the firm offer to purchase the subject property at RM54m but the appellants did not respond. The conduct of the appellants and the deliberate failure to revert knowing well that the prospective buyer of firm offer would not H wait indefinitely, displayed a blatant lack of regard and respect towards the liquidator. In the premise, the learned judge had not fallen into error when she found that this issue did not meet the threshold to remove the liquidator (see paras 58, 60 & 64–65).

I (5) The appellants had no locus to submit for UOB and R&M on the alleged unlawful dealing with the subject property. Any complaint on this issue should have been raised by the UOB and/or R&M (see para 71).

(6) The learned judge had addressed the issue of impartiality and found that: (a) all the sale and purchase agreements were executed prior to the

appointment of the liquidator; (b) the liquidator was not a party to any of these agreements, as such, these agreements were of no relevance to the removal application and could be disregarded; and (c) all these agreements were executed on a willing seller and willing buyer basis with due consideration. The court found no errors in the decision of the learned judge (see paras 79–81).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan hakim mahkamah tinggi yang mengetepikan permohonan perayu untuk menyingkirkan penyelesai yang dilantik oleh mahkamah untuk responden pertama ('penyelesai tersebut'). Fakta ringkas adalah bahawa pengarah responden pertama memohon agar satu pemegang saham dan pengarah perayu kedua untuk melabur dan mendapatkan pelabur untuk membiayai pemilikan responden pertama akan hartanah tersebut. Responden pertama telah memasuki satu perjanjian jual beli dengan beberapa pihak untuk membeli hartanah tersebut pada 28 Februari 2014 dan mendapatkan satu pinjaman berjangka daripada United Overseas Bank (M) Bhd ('UOB') untuk membiayai sebahagian daripada hartanah tersebut yang dijamin dengan debentur terhadap hartanah tersebut. Namun, responden pertama digulungkan secara wajib atas petisyen responden kedua untuk kegagalan untuk membayar caj penyelenggaraan untuk hartanah tersebut dan penyelesai tersebut dilantik oleh responden pertama. Lanjutan itu, atas sebab kegagalan untuk responden pertama membayar, UOB melantik dua orang sebagai penerima dan pengurus penerima pertama (R&Ms). Penyelesai telah menerima tawaran daripada Paradise Boulevard untuk mendapatkan hartanah tersebut untuk RM54 juta dan memohon kepada mahkamah untuk arahan untuk penjualan hartanah tersebut memandangkan izin UOB tidak diperoleh. Pada 19 Jun 2017, perayu dalam kapasiti mereka sebagai penyumbang majoriti responden pertama memfailkan satu permohonan untuk menyingkirkan penyelesai tersebut dibawah s 232(1) Akta Syarikat 1965. Rayuan ini berkenaan dengan isu-isu berikut: (a) penolakan perayu sebagai pemiutang dan penyumbang responden pertama; (b) kegagalan penyelesai untuk memberi notis kepada perayu berkenaan dengan mesyuarat pemiutang; (c) kegagalan untuk menimbangkan penolakan salah bukti hutang (POD); (d) penjualan salah hartanah tersebut dibawah harga pasaran; (e) urusan tidak sah hartanah tersebut yang digadaikan kepada UOB; dan (f) ketiadaan ketidakberpihakkan dalam menentukan pemiutang responden pertama.

Diputuskan, mengetepikan rayuan:

(1) Adalah tidak adil untuk peguam terpelajar untuk mengkritik hakim terpelajar untuk tidak mengambil kira isu-isu berkenaan dengan kegagalan penyelesai untuk menyiasat hal berkaitan responden pertama dan penolakan penyelesai berkaitan dengan responden sebagai

pemiutang dan penyumbang kepada responden pertama atas sebab bahawa peguam perayu tidak mendalami isu-isu ini dalam hujahan bertulis atau lisannya. Perayu oleh itu tidak boleh dibenarkan untuk mengetengahkan isu-isu ini di hadapan mahkamah rayuan mengharapkan campur tangan. Apa-apa campur tangan akan terjumlah kepada pelanggaran peraturan keadilan asasi kerana hakim terpelajar tidak diberikan peluang untuk mengetengahkan pandangannya atas perkara tersebut (lihat perenggan 15–16).

(2) Peruntukan dalam k 114 Peraturan Syarikat (Penggulungan) 1972 adalah jelas bahawa hanya pemiutang syarikat berhak untuk diserahkan dengan notis. Memandangkan penyelesai tidak menerima perayu sebagai pemiutang responden pertama, isu kegagalan penyelesai untuk memberikan notis kepada perayu berkenaan dengan mesyuarat merupakan satu *non-starter* dan tidak memadai untuk terjumlah kepada satu sebab munasabah untuk satu penyingkiran (lihat perenggan 32–33).

(3) Hakim terpelajar tidak memberikan apa-apa pandangan atas penolakan POD kerana perayu tidak meneruskan isu ini dihadapan hakim terpelajar atas sebab wujud satu rayuan yang mencabar keputusan penyelesai dalam menolak POD yang mana masih menantikan rayuan. Lanjutan itu, melalui satu permohonan untuk menangguhkan, pihak-pihak bersetuju untuk menangguhkan permohonan rayuan terhadap penolakan POD menantikan penyelesaian rayuan ini. Perayu tidak boleh dibenarkan untuk membangkitkan isu penolakan POD yang mana merupakan inti pati rayuan lain yang belum diselesaikan (lihat perenggan 38–40).

(4) Penyelesai telah memberikan notis kepada perayu pertama berkenaan dengan tawaran jelas tersebut untuk membeli hartanah tersebut pada jumlah RM54 juta tetapi perayu tidak memberikan apa-apa balasan. Kelakuan perayu dan kegagalan gagal untuk memaklumkan semula dengan pengetahuan bahawa bakal pembeli dengan tawaran jelas tidak akan tunggu selama-lamanya, menunjukan ketidakendahan jelas dan ketidakhormatan kepada penyelesai. Atas sebab ini, hakim terpelajar tidak terkhilaf apabila beliau mendapati bahawa isu ini tidak memenuhi ambang untuk menyingkirkan penyelesai tersebut (lihat perenggan 58, 60 & 64–65).

(5) Perayu tiada locus standi untuk berhujah bagi pihak UOB dan R&M atas urusan yang tidak sah berkaitan dengan hartanah tersebut. Apa-apa aduan atas isu ini seharusnya dibangkitkan oleh UOB dan/atau R&M (lihat perenggan 71).

(6) Hakim terpelajar telah menyelesaikan isu berkaitan dengan ketidakberpihakkan dan mendapati bahawa: (a) semua perjanjian jual beli telah dilaksanakan sebelum pelantikan penyelesai; (b) penyelesai

bukan satu pihak kepada perjanjian ini, oleh itu, perjanjian ini tiada relevan dengan permohonan penyingkiran dan boleh diketepikan; dan (c) semua perjankian ini dilaksanakan atas sebab penjual sudi dan pembeli sudi dengan balasan. Mahkamah tidak mendapati apa-apa kekhilafan dalam keputusan hakim terpelajar (lihat perenggan 79–81).]

Notes

For cases on removal of liquidators, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 606–611.

Cases referred to

K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor [2005] 2 MLJ 201; [2005] 1 CLJ 793, FC (refd)

Public Finance Bhd v Harta Pertama Sdn Bhd & Ors [2002] 4 MLJ 599, CA (refd)

Yayasan Bumiputera Sabah & Anor v Apoview Wood Products Sdn Bhd (receivers and managers appointed) [2012] 6 MLJ 668; [2012] 7 CLJ 593, CA

Legislation referred to

Companies (Winding-Up) Rules 1972 rr 91, 114, Forms 57, 58
Companies Act 1965 ss 232(1), 233, 237, 274

Appeal from: Companies Winding-Up No 28NCC-812–09 of 2015 and Post-Companies Winding-Up Application No WA-28PW-14–06 of 2017 (High Court, Kuala Lumpur)

Porres Royan (Roobini Stephanie with him) (Kumar Partnership) for the appellants.
Ranjan Chandran (Pamela Ephraim dan Nanthini Devi with him) (Sheela Devi & Co) for the first respondent.
So Chien Hao (Ze Yi & Kee) for second respondent.
Shobah Veera (Hakem Arabi & Assoc) for the third respondent.

Yew Jen Kie JCA:

[1] Vide the notice of appeal dated 18 September 2017, the appellants appealed against the decision of the learned High Court judge, given on 8 September 2017, for dismissing the appellants' application for removal of Tharma Iswara a/l S Subrarnaniam ('Mr Tharma'), the court appointed liquidator of the first respondent ('the liquidator').

[2] The first respondent, on the other hand, filed a cross-appeal against the decision of the learned High Court judge in dismissing the first respondent's

A preliminary objection, namely, in holding that no leave is required to file the application for removal of the liquidator.

[3] At the hearing on 14 January 2019, learned counsel for the first respondent intimated to the court that the first respondent had withdrawn the cross-appeal. The cross-appeal was accordingly struck out with no costs, as agreed.

[4] On 14 January 2019, we dismissed the appeal of the appellants and these are our reasons for the dismissal.

[5] The background facts leading to the present appeal as set out by the appellants are as follows:

(a) in October 2013, the shareholders and the directors of the first respondent, namely, Tan Chong Whatt ('TCW') and Tan Chor Keng ('TCK'), requested Gerald Yeo, a shareholder and director of the second appellant, to invest and secure investors to fund the first respondent's acquisition of 168 units of Pandan Safari Lagoon Mall ('the subject property');

(b) in this connection, the second appellant and 13 investors including the first appellant ('13 investors') advanced the first respondent approximately RM67m comprising of:

(i) RM50m from the 13 investors; and

(ii) RM16.4m from the second appellant;

(c) on 28 February 2014, the first respondent entered into a sale and purchase agreement with various parties to purchase the subject property at an aggregate sum of RM100m;

(d) on 25 November 2014, United Overseas Bank (M) Bhd ('UOB') granted the first respondent a term loan of RM30m to part finance the purchase of the subject property secured against a debenture over the subject property;

(e) on 4 December 2015, the first respondent was compulsorily wound up on the petition of the second respondent for non-payment of maintenance charges for the subject property in the sum of RM1.39m ('winding up order'). Mr Tharma was appointed as the liquidator for the first respondent;

(f) on 19 September 2016, UOB demanded from the first respondent the full payment of the outstanding sum of RM30,539,923.60 within ten days;

(g) on 23 November 2016, owing to the first respondent's default in repayment, UOB appointed Dato' Heng Ji Keng and Andrew Heng as receivers and manager of the first respondent ('R&Ms');

(h) on 14 March 2017, the liquidator accepted an offer from Paradise Boulevard Sdn Bhd ('Paradise Boulevard') to acquire the subject property for RM54m;

(i) on 26 May 2017, the liquidator applied to court for directions for the sale of the subject property as UOB's consent as the chargee bank was not obtained; and

(j) on 19 June 2017, the appellants in their capacity as the majority contributories of the first respondent filed an application ('removal application') under s 232(1) of the Companies Act 1965 ('the 1965 Act') to remove the liquidator, which was dismissed. Hence, the appeal.

MEMORANDUM OF APPEAL

[6] Gleaning from the memorandum of appeal, the appellants complained that the learned judge had fallen into the following errors in deciding not to remove the liquidator of the first respondent:

(a) in taking into account irrelevant considerations;

(b) in failing to take into relevant consideration;

(c) in failing to apply correct principles and misdirected herself which had occasioned in miscarriage of justice;

(d) in failing to apply the correct test;

(e) in applying too lenient a standard required by the liquidator of the first respondent when the learned judge should have evaluated the conduct of the liquidator by applying a much higher test as required by decided cases; and

(f) in failing to draw proper inferences based on the totality of the evidence placed before the learned judge.

SUBMISSION OF THE APPELLANTS

[7] It is clear from the written submissions as well as the oral submission of learned counsel for the appellants that the appeal revolved around the following issues:

(a) rejection of the appellants as creditors and/or contributories of the first respondent;

A (b) failure of the liquidator to give notice to the appellants of the creditors' meeting;

(c) failure to consider unlawful rejection of the proof of debt ('POD');

(d) unlawful sale of the subject property at an undervalue;

B (e) unlawful dealing with the subject property which is the charged property;

(f) wrongful retention of rental proceeds; and

(g) lack of impartiality in determining the first respondent' creditors.

C *Rejection of the appellants as creditors and contributories of the first respondent*

[8] Learned counsel for the appellants submitted that it is an integral part of the liquidator's duty to investigate the company affairs from inception. A D liquidator who fails to investigate the affairs of a company to the prejudice of an applicant is in neglect of his duty and can be removed.

[9] Learned counsel for the appellants submitted that if only the liquidator had investigated the affairs of the first respondent from its inception, he would E have found that the second appellant and the 13 investors including the first appellant are creditors and contributories of the first respondent. In addition, the second appellant is also the agent/representative of the 13 investors.

F **[10]** It was submitted that the investigation if carried out would have revealed the following facts:

(a) the second appellant and the 13 investors had invested SGD12.2m plus USD4.94m plus RM8m (approximately RM67m comprised RM59m loan and RM8m in equity) into the first respondent. These monies G together with the term loan granted by UOB were used to purchase the subject property;

(b) the remittance of the invested sum of money is reflected in the first respondent's MBB statements and the first respondent's UOB statements (describing the remittance of the second appellant as 'inter-company H loans' and 'share subscription') (exh GY10 annexed to para 8 of affidavit in support affirmed by Gerald Yap ('AIS') at pp 411–420 ROA referred). The MBB statements are attached to the POD marked exh GY1 annexed to the AIS;

I (c) the investment agreement dated 28 November 2013 between the second respondent as agent/trustee for the 13 investors and the first respondent as borrower evidenced that the second appellant and the 13 investors are creditors of the first respondent and that the second appellant represented the 13 investors;

(d) the investment agreement was subsequently replaced by a shareholders' loan agreement dated 30 June 2016 between the second appellant and the first respondent;

(e) by memorandum of agreement ('MOA') dated 26 July 2014 between the second appellant and the first respondent's other shareholder, the second appellant subscribed for RM8m worth of the first respondent's shares. It recorded that the second appellant had arranged RM40m to part finance the purchase of the subject property which sum was channelled through the second appellant as agent/trustee of the 13 investors, that these funds are identified as shareholders' loan repayable with interest, that the second appellant be paid RM3.5m for its effort to raise funds ie the advances from the 13 investors; and

(f) by a subsequent shareholder loan agreement dated 3 November 2014 between the first respondent and the second appellant whereby the second appellant advanced further loans of SGD2.7m to the first respondent repayable with interest.

[11] It was submitted that the liquidator had failed to consider the substantial documentary evidence that the appellants are creditors of the first respondent.

[12] It was submitted that the liquidator's refusal to recognise the appellants as creditors is intended to exclude them from the liquidation.

[13] It was submitted that the liquidator is misconceived in alleging that the loans were illegal money transaction, that the loan had been converted to equities and that the loans were deposited directly by the 13 investors and not by the second appellant for the following reasons:

(a) the first respondent's solicitors advised that the Foreign Exchange Administration Guidelines of Bank Negara Malaysia ('BNM') permitted borrowing of RM1,000m from non-residents without BNM's approval. Exhibit GY57 annexed to AIO is referred;

(b) neither UOB nor the first respondent's bank, MBB, queried the appellants or the first respondent on the remittance received by them; and

(c) the allegation that the advances had been converted to equity is baseless as the investment agreement, MOA, shareholder loan agreement envisaged that the loan would be repaid with interest. Only RM8m of the RM67m loan was converted to equity.

[14] Counsel for the appellants submitted that the liquidator's conduct demonstrated an unsound mind and misconceived attitude. The learned judge

failed to sufficiently evaluate the conduct of the liquidator which was detrimental to the appellants.

[15] We are of the considered view that it is unfair for learned counsel for the appellants to criticise the learned judge for not considering the issues raised in the foregoing paragraphs for the reason that counsel for the appellant did not canvass these issues either in their written or oral submissions before the learned judge. Under the circumstance, the learned judge did not have the opportunity to deliberate and to rule on them.

[16] The Court of Appeal had an occasion to address a similar situation in the case of *Public Finance Bhd v Harta Pertama Sdn Bhd & Ors* [2002] 4 MLJ 599. At the appeal stage, the appellant's counsel sought, among others, to raise another point not addressed specifically in the memorandum of appeal. It was held:

> The other point counsel sought to raise was not addressed specifically in the memorandum of appeal and it was thus inappropriate for the Court of Appeal to express any views on the matter. This was particularly so when the point was not put to the trial judge at the conclusion of the case in the manner it was put before the Court of Appeal. Any attempt by the Court of Appeal to intervene in this appellate stage would constitute a breach of the rules of natural justice especially when the trial judge had not been given an opportunity to express his views on the matter (see p 602C–E).

[17] By reason that the appellants did not ventilate the issue on the liquidator's failure to investigate the affairs of the first respondent and the liquidator's rejection of the appellants as creditors and contributories of the first respondent, the appellants cannot be permitted to put these issues before us at the appeal stage hoping for our intervention. Any intervention by us would tantamount to breach of the rule of natural justice as the learned judge had not been given an opportunity to express her views on the matter.

Failure to serve a proper notice of meeting of contributories to the appellants/unlawful rejection of the proof of debt

[18] The appellants submitted that the liquidator is duty bound to notify all creditors of meeting in the liquidation process. However, the liquidator had breached his duty be failing to effect proper service to the appellants resulting in the appellants not being able to participate in the creditors' and/or contributories' meeting held on 20 April 2016.

[19] Counsel for the appellants submitted that the liquidator had obtained the details of the appellants' contact from UOB Vice President, Mr Lim Ping Shyong, hence they would have known from those details that the appellants

are Singaporeans and therefore have no ready access to Malaysian newspapers and *gazette*. A

[20] It was submitted that pursuant to r 114 of the Companies (Winding-Up) Rules 1972 ('Winding-Up Rules'), a liquidator is required to serve notice of creditors' and contributories' meeting by post which the liquidator had failed to so. B

[21] It was submitted that the appellants did not know the establishment of the committee of inquiry ('COI') until a year later when they received a letter dated 3 May 2017 from the liquidator, seeking for any other higher offer from the appellants on the proposed tender sale of the subject property. C

[22] It was submitted that the appellants as the majority contributories of the first respondent ought to have been made a member of the COI. The appellant by a letter dated 16 May 2017 had suggested to the liquidator to reconsider the formation of the COI but the liquidator never responded to the above suggestion. D

[23] It was submitted that the liquidator had, despite repeated requests by the appellants, failed to inform the appellants of the formation of COI despite them being the majority shareholders holding 80% of the shareholding in the first respondent and the representation of the largest creditors ie the 13 investors. E F

[24] It was submitted that the liquidator intentionally kept the appellants from the first respondent's creditors' meetings thereby denying them of their legitimate expectation and lawful right to participate in the creditors' meetings and the COI, so that they could ensure the liquidation was conducted in the benefit of the creditors and/or contributories of the first respondent. G

[25] It was submitted that if the liquidator had any doubt about the appellants' locus and was unable to decide if the appellants were creditors of the first respondent, the liquidator as an officer of court who owns statutory and fiduciary duties to the first respondent's creditors, ought to have sought the court's direction on this important issue. The determination of this issue is important to the appellant as the appellants' right to participate in the creditors' meetings and COI meeting and the acceptance of the POD would depend on this. However, the liquidator failed to so in breach of his duties and of s 274 of the 1965 Act. H I

[26] It was submitted that the learned judge failed to appreciate that the conduct of the liquidator was detrimental to the appellants as creditors and that

A the liquidator had acted in gross disregard to the rules governing liquidation and in breach of his fiduciary duty.

[27] The grounds of judgment shows that the learned judge had considered para 84 of the AIS filed by the second respondent which substantially touched on the same matters as ventilated in the above submission.

[28] The judgment showed that the learned judge has accepted the explanation of the liquidator that based on the POD, he had found that the second appellant is not a creditor of the first respondent, neither has he any authority as agent/trustee to file any POD on behalf of the other investors as these purported investors had commenced filing their own POD.

[29] The learned judge rightly stated that the decision whether to accept or reject a POD is entirely the discretion of a liquidator and a dissatisfied creditor has recourse by way of appeal to the court.

[30] The learned judge took cognisance that the appellants had filed an appeal vide WA-28PW-68–08 of 2017 appealing against the decision of the liquidator in rejecting their POD, and the appeal is now pending hearing.

[31] Section 114 of the Winding-Up Rules stipulates:

> 114 Summoning of meetings
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> (1) The liquidator shall summon all meetings of creditors and contributories by giving not less than seven days' notice of the time and place thereof in the Gazette and in one or more local newspapers; and shall, not less than seven clear days before the day appointedfor the meeting, send by post to every person appearing by the company's books *to be a creditor of the company* notice of the meetings of creditors, and to every person appearing by the company's books or otherwise to be a contributory of the company, notice of the meeting of contributories.
>
> (2) *The notice to each creditor* shall be sent to the address given in his proof, or if he has not proved to the address given in the statement of affairs of the company, or to such other address as may be known to the person summoning the meeting. The notice to each contributory shall be sent to the address mentioned in the company's books as the address of the contributory, or to such other address as may be known to the person summoning the meeting. (Emphasis added.)

[32] It is abundantly clear from the above provision in r 114 that only creditors of the company are entitled to be served with notice.

[33] Since the liquidator had not accepted the appellants as creditors of the

first respondent, the issue of the liquidator failing to give proper notice to the appellants of meeting in accordance with r 114 of the Winding-Up Rules is a non-starter and insufficient to constitute a reasonable cause for removal.

Unlawful rejection of proof of debt

[34] The appellants complained that the second respondent had filed the POD which was duly acknowledged by the liquidator on 6 January 2017. However, the liquidator rejected the POD on the basis that it was not filed within the prescribed time.

[35] Learned counsel for the appellants submitted that the liquidator does not have unfettered discretion to reject or accept POD. It was submitted that any delay in the submission of POD was caused by the liquidator's failure to discharge his statutory and fiduciary duties under r 91 of the Winding-Up Rules.

[36] It was submitted that pursuant to r 91 of the Winding-Up Rules, the liquidator shall give notice of the days fixed for the creditors of the first respondent to prove their debts or claims, and also notice in Form 57 or 58 of such day to every person who to the knowledge of the liquidator claims to be a creditor of the company or to every person mentioned in the statement of affairs as a creditor who has not proved his debt.

[37] It was submitted that the appellants are listed as the first respondent's creditor in the statement of affairs (exh GY48 of AIS referred). Despite this, the liquidator, in breach of his statutory duties, failed to provide the appellants with notice in the prescribed form under r 91 of the Winding-Up Rules of the date for submission of the POD. Thus, the liquidator is not entitled to reject the POD on the basis of delay.

[38] We observe that the learned judge did not give any view on the rejection of the POD submitted by the appellants. This is because counsel for the appellants did not pursue this issue before the learned judge by reason that there is an appeal challenging the decision of the liquidator in rejecting the POD which appeal is still pending.

[39] We take judicial notice that the appellants had filed a stay application and during the hearing of the stay application, both the respondents and the appellants agreed to stay the appeal application against the rejection of the POD pending the disposal of the appeal herein.

[40] In our considered view, the parties having agreed by consent to stay the hearing of the appeal application against the decision of rejecting the POD, the

appellants cannot be allowed to raise this issue of rejection of POD which suggest that the reason is more to do with the very issue being the subject of another pending appeal and that it should be addressed there (see paras 30 and 38 above).

Unlawful sale of the subject property at an undervalue

[41] The appellants complained that the liquidator had breached his statutory and fiduciary duties and had not acted in the best interest of the creditors and contributories of the first respondent in selling the subject property at the price of RM54m, which the appellants alleged is at a gross undervalue.

[42] The appellants complained that in 2012, Messrs Azmi & Co valued the subject property at RM220m and subsequently in 2014, at RM240m.

[43] Prior to the granting of the term loan by UOB circa 5 November 2015, VPC Alliance (KL) Sdn Bhd valued the subject property at RM107.8m. The second valuation carried out for the R&M on 9 June 2017 valued it at a forced sale value of RM87.57m given the condition of the subject property.

[44] It was submitted that the above are the nearest credible valuations at the time of the sale of the subject property.

[45] However, submitted learned counsel for the appellants, the liquidator instead relied on the value of RM28.62m by Solid Estate Consultant Sdn Bhd ('Solid Estate') dated 13 September 2016 and RM51.96m by Nawawi Tie Leung Property Consultants Sdn Bhd ('Nawawi Tie') dated 8 February 2017 in the sale of the subject property to Paradise Boulevard.

[46] It was submitted that the valuations of Solid Estate and Nawawi Tie are questionable as they do not reflect the standard acceptable practice as no details on the methods and comparison were shown as to how the values were derived. As such they are unreliable and do not truly reflect the market value of the subject property.

[47] It was submitted that the sale of the subject property below the market value has prejudiced the interest of the bona fide investors and contributories of the first respondent, including the appellants.

[48] The same argument was canvassed and ventilated before the High Court. In our view, the learned judge correctly opined:

> Penilaian yang tinggi iaitu RM85,000,000 tidak bermakna sekiranya tiada pembeli.

Berdasarkan keputusan Ramly Ali HMT (kini HMP) dalam *Abric Project Management & Anor v Palmshine Plaza Sdn Bhd & Anor* [2007] 5 MLJ 685; [2007] 10 CLJ 7 yang merujuk kepada kes Mahkamah Rayuan dalam *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662; [1997] 2 CLJ 516 bahawa nilai komersial sebenar sesuatu hartanah itu adalah harga sebenar harta tersebut boleh diperolehi dipasaran terbuka.

[49] It is to be noted that the valuation of RM220m by Messrs Azmi & Co was for the whole subject property inclusive of the common areas and the roof top.

[50] However, after acquiring the subject property which comprised of 93% of Pandan Safari Lagoon Mall, the first respondent failed to pay for the maintenance and service charges since 2014 until present day.

[51] For the above reasons, the second respondent could not carry out proper management and maintenance of the subject property, this resulted in a significant depreciation in the market value of the subject property as it is dilapidated, deteriorating and in uninhabitable condition with problems of severe and extensive leakages, water logged damage everywhere, flooding of the basement car park, no electricity supply and the shopping mall was operating in darkness and very few tenants occupying the mall.

[52] The valuations given by the Azmi & Co, Solid Estate and Nawawi Tie are at best, estimated market value of the subject property. These valuations give an approximate indicator of the value of the property but do not necessarily translate into the actual price of the property that buyers are willing to pay for.

[53] The second respondent who is supportive of the sale of the subject property submitted that when the liquidator was able to secure a buyer to purchase the subject property, after a series of efforts carried out by the liquidator to secure purchasers, the completion of the intended sale and purchase transaction not only would settle the debt owing to the second respondent, the second respondent would also use the payment to properly manage and maintain the subject property for the benefit of all the occupants of the subject property.

[54] It is to be noted that the two guarantors, that is, TCW and TCK (also the fourth and fifth respondents) are mindful that the sale of the subject property will reduce their liability to UOB and they confirmed that they have no objections to the sale and responded to the liquidator's letter dated 3 May 2017.

A **[55]** The liquidator has shown that he had since his appointment in 2015, tried to secure a prospective buyer in the best interests of both the secured and unsecured creditors. Prior to the bid of RM54m, he had rejected an earlier bid to purchase the subject property for RM30m which was done by tender exercise, as the bid was too low and insufficient to settle the colossal sum of
B RM30539,923.60 owing to UOB.

[56] The bid to purchase the subject property at RM54m was also done by tender exercise and it was the only firm offer available for the Liquidator to
C accept.

[57] Although UOB and R&M claimed that they had a higher valuation on the subject property, they had no firm buyers by tender.

D **[58]** It is significant to note that the liquidator had given notice vide letter dated 16 May 2017 to the second appellant of the firm offer to purchase the subject property at RM54m. The second appellant was asked to secure any such higher offer and to revert on or before 3 May 2017. The second appellant did not respond.
E

[59] Then, vide another letter dated 3 May 2017 addressed to the second appellant, the liquidator referred to his earlier letter dated 16 May 2017 and mentioned that the deadline of 3 May 2017 had lapsed and extended it to 10 May 2017. Again, the second appellant did not respond.
F

[60] Likewise, the liquidator had also given notice vide letter dated 16 May 2017 to the first appellant of the firm offer to purchase the subject property at RM54m. The first appellant was asked to secure any such higher offer and to
G revert on or before 3 May 2017. The first appellant did not respond.

[61] Then, vide another letter dated 8 May 2017 addressed to the first appellant, the liquidator referred to his earlier letter dated 16 May 2017 and mentioned that the deadline of 3 May 2017 had lapsed and extended it to
H 10 May 2017. Again, the first appellant did not respond.

[62] Only on 16 May 2017, after the expiry of both the earlier deadlines and subsequent to the acceptance of the offer to purchase at RM54m, did the first appellant send a letter to the liquidator, prohibiting the liquidator from
I holding separate meetings of creditors and contributories to consider the sale of the subject property at RM54m and to adhere to the formalities of the COI.

[63] By his response letter dated 16 May 2017, it is as clear as daylight that the appellants had received the notices issued by the liquidator. Yet they sat on

the letter and refused to respond. If they were genuinely concerned that the subject property was going to be sold at a gross undervalue as they alleged, they ought to have responded or reacted much earlier to the notices served, the service of which are not in dispute.

[64] The conduct of the appellants aforesaid, and the deliberate failure to revert knowing well that the prospective buyer of firm offer will not wait indefinitely, displayed a blatant lack of regard and respect towards the liquidator.

[65] In the premise, the learned judge has not fallen into error when she found that these two grounds do not meet the threshold to remove the liquidator.

Unlawful dealing/possession of the subject property which is charged to UOB

[66] The complaint under this head is that the subject property being an asset of the first respondent that had been charged to UOB secured by a debenture is no longer an asset of the first respondent unless it is first redeemed. As such, s 233 which empowers a liquidator to take into custody property to which the company is to be entitled has no application.

[67] In support of the above contention, two cases are cited.

(a) the Federal Court case of *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor* [2005] 2 MLJ 201; [2005] 1 CLJ 793 where it was held that receivers and managers have the legal right to possession of these assets pursuant to the debenture even where a company has been wound up and a liquidator appointed; and

(b) Court of Appeal's case of *Yayasan Bumiputera Sabah & Anor v Apoview Wood Products Sdn Bhd (receivers and managers appointed)* [2012] 6 MLJ 668; [2012] 7 CLJ 593, it was held that it is beyond the liquidator's statutory power to take control over charged assets to the exclusion of the secured creditor.

[68] It was submitted for the appellants that the liquidator had abused his power by taking into his possession and dealing with the subject property to the exclusion of the R&M who were legally entitled to deal with the same. UOB and R&M had refused to give consent to the proposed sale of the subject property to Paradise Boulevard which resulted in the liquidator filing an application seeking direction/validation from the court under s 237 of the 1965 Act ('s 237 application').

[69] It was submitted that the appellants and the R&M opposed the s 237 application but it did not deter the liquidator, even without obtaining the orders sought in the s 237 application, to proceed to sell the subject property at a gross undervalue and in abuse of his power as liquidator.

[70] It was submitted that in the face of express objection by the appellants, UOB and R&M to the sale of the subject property to Paradise Boulevard, the liquidator cannot rely on the COI sanction. It is clearly provided in s 237 of the 1965 Act that where there is dispute between the creditors/contributories and the COI, the former prevails over the latter.

[71] We are of the considered view that the appellants have no locus to submit for UOB and R&M on the alleged unlawful dealing with the subject property. Any complaint on this issue should have been raised by the UOB and/or R&M.

[72] It is a fact that initially R&M objected to the sale of the subject property on the ground that the sale of the subject property was solely vested with the secured creditor, UOB. Subsequently, the liquidator convinced UOB that there was a ready and willing buyer in Paradise Boulevard to purchase the subject property at a price of RM54m and UOB's colossal indebtedness of RM30,539,923.60 shall be settled in full.

[73] We take judicial notice that UOB's debt had been settled in full with the proceeds from the sale of the subject property, a redemption statement was issued and the R&M had filed a cessation of duty as their task had been deemed completed vide the settlement of the total indebtedness of the first respondent to UOB.

[74] The cessation of the R&M duty was premised upon the instructions of UOB and recorded in the winding up court.

[75] The first respondent then withdrew the s 237 application since all matters relating to the sale had concluded with the sanction of the winding up court.

Lack of impartiality in determining the first respondent's creditors

[76] The appellants complained that the liquidator had not acted impartially because of his previous association with certain parties when dealing with the assets of the first respondent in liquidation and in the face of competing interests.

[77] The appellants alleged that the liquidator had admitted certain parties

including Temasek Sria Hartanah, Ikon Corporate, Viceroy Properties and Ikon Hartanah as creditors of the first respondent without proof that they are genuine creditor of the first respondent, while rejecting the appellants as creditors despite overwhelming evidence to that effect.

[78] Further, alleged the appellants, the liquidator held that the first respondent owned salaries and directors fee to certain parties including TCW, TCK, Lim Soi Mui and Thayaparan Kanapathipillai, while disregarding the MOA which clearly refers to Gerald Yeo as the director of the first respondent.

[79] We observed that the learned judge had considered the allegations raised in the appellants' affidavit in support alleging that the liquidator failed to disclosed the fact that he was the liquidator for the sellers of the units of the subject property who sold their units to the first respondent. The learned judge addressed the issue of impartiality and held at para 27 of the judgment:

> Namun deponent tidak mengemukakan dengan bukti kukuh konflik dan keuntungan tidak wajar tersebut berlaku ... dan adalah perkara sebelum perlantikan perlikuidasi ... walau apapun dakwaan pemohon-pemohon terhadap transaksi penjualan hartanah tersebut, penjualan adalah berdasarkan perjanjian jual beli dan balasan sah ...

[80] The learned judge had summarised the issue of impartiality thus:

(a) all these sale and purchase agreements were executed prior to the appointment of the liquidator as the liquidator of the first respondent on 4 December 2015;

(b) the liquidator was not a party to any of these agreements. Thus, these agreements are of no relevance to the removal application and can be disregarded; and

(c) all these agreements were executed on a willing seller and willing buyer basis with due consideration.

[81] We fail to see any errors in the decision of the learned judge.

[82] We note that the learned judge did not express any view on the directors, fees and salaries as this issue was never raised at the hearing before the winding up court. Accordingly, the appellants are not allowed to address this issue at the appeal stage. See, *Public Bank Bhd* case.

CONCLUSION

[83] Regards being had for all the reasons aforesaid, we find no merits in the appeal and dismiss it accordingly.

Appeal dismissed.

Reported by Izzat Fauzan